such an exercise does not give rise to any inference of malice on the part of the Defendant. As for the allegation in sub-paragraph (c) relied upon by the Plaintiff, there is no evidence, nor can it be inferred, that the Defendant was making a personal attack on the Plaintiff. On the contrary, he took pains to clarify this at the conference when he said:

"I want to make clear that any statements of mine this afternoon about the opposition parties and about their leaders are not about them as individuals but about them as politicians. In other words, I do not cast any aspersions on them as individuals. I only challenge their credentials as politicians, as people who aspire to be MPs."

With regard to the last allegation in sub-paragraph (d) that the Defendant uttered the words knowing them to be untrue or recklessly not caring whether they are true or false, I find there is no basis for such an allegation. As I said before, there were facts on which the Defendant could honestly make his comment.

The Defendant was subject to a prolonged cross-examination in which he gave his evidence with candour. Nothing has emerged therefrom or elicited from him which cast any doubt or suspicion on the *bona fides* of his belief that the conclusion he came to was true. I find no ground for disbelieving him that the belief he entertained was a genuine and honest one. In considering this issue I find most pertinent the following passage from the judgment of Lord Diplock in *Horrocks* v. *Lowe*, [10] notwithstanding that the words complained of were uttered by the Defendant in the course of an analysis of his political opponents:

"Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief." If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more."

Lord Diplock in that case was dealing with the question of malice affecting the defence of qualified privilege but what was said there equally applies to malice affecting the defence of fair comment. In conclusion, I find that the Plaintiff has failed to discharge his burden of proving that the Defendant was actuated by malice when he uttered the words complained of.

Accordingly, this action is dismissed with costs.

Action dismissed.

Solicitors: *Drew & Napier.*

THE "KUSU ISLAND" M.V. "BRANI ISLAND", OWNERS OF CARGO LADEN ON BOARD v. M.V. "KUSU ISLAND", OWNERS OF

[A.C.J. (Lai Kew Chai J.) December 2, 1983]
[Singapore – Admiralty in Rem No. 698 of 1980]

Shipping Law – Admiralty action in rem – Correction of name of defendant – Renewal of admiralty writ in rem – Circumstances for consideration – Whether action in rem was action against res – R.S.C. 1970, O. 6 r.7(2), O.20 rr.1 (1), 4(1), 5(3), & O. 32 r. 6.

This appeal involved the circumstances under which the name of a defendant in an admiralty *in rem* action may be corrected under O. 20 r. 5(3) of the Rules of the Supreme Court 1970 and of the circumstances under which an admiralty writ *in rem* may be renewed under O. 6 r. 7(2). The appellants were the receivers and owners of certain bales of cotton sheets shipped under 2 bills of lading in the respondents' vessel known as "Brani Island". The appellants found some damage to the goods giving rise to a claim of about $110,000. When negotiations for an amicable settlement failed the appellants commenced an admiralty *in rem* action for damages against the owners of the ship or vessel "Brani Island". The writ was issued 10 days before the expiry of the one year limitation period which fell on October 26, 1980. On April 21, 1981, the appellants under O. 20 r. 1(1) amended the writ by deleting the name of the respondents and substituting therefore the words: "The Owners of the ships or vessels *Brani Island, Senang Island, Kusu Island.*" Leave was granted by the Assistant Registrar to renew the writ for a period of 12 months from October 16, 1981. On October 24, 1981, the writ after the usual deletions of the names of *Brani*

Island and *Senang Island,* was served on *Kusu Island.* On November 2, 1981, the respondents entered a conditional appearance. The respondents applied for: (1) an order that the amendment on April 21, 1981 be struck out and service on "Kusu Island" be set aside; (2) An order that order of court dated October 23, 1981 renewing the writ for a period of 12 months and the service thereof be set aside. The Registrar granted the respondents' application and hence this appeal before the Judge in Chambers.

Held: (1) the amendment, which added the names of both *Senang Island* and *Kusu Island,* was merely a variation or amplification of the name of the respondents which owned all three ships at all material times. The respondents were the only defendant intended to be sued from beginning to end. It is fallacious to assume that a new defendant was introduced or added by the amendment;

(2) an action *in rem* is not an action against the *res* itself but is merely a procedural device to obtaining jurisdiction over the owner of the *res.* In a Writ *in rem,* the defendant is not described simply as "the ship X" but as "The Owners of the ship X";

(3) the appellants here brought themselves within the provisions of paragraph (3) of Order 20 rule 5 of the Rules of the Supreme Court, 1970;

(4) the appellants had not exercised due diligence. The vessels, *the Senang Island* and the *Kusu Island* were present within jurisdiction on so many occasions and there were ample opportunities for the appellants, if they had been more vigilant to have effected service of the Writ or either of them. The Registrar having been apprised of the visits of both the vessels, had properly exercised his discretion in setting aside the order renewing the writ;

(5) in the circumstances, the appeal is dismissed with costs as to prayer 2 of the respondents' application. The appeal as to prayer 1 of the application would be allowed with costs.

Cases referred to:

(1) *G.L. Baker Ltd.* v. *Medway Building & Supplies Ltd.* [1958] 1 W.L.R. 1216, 1231.
(2) *The Preveze* [1973] 1 Lloyd's Rep. 202.
(3) *Heaven* v. *Road & Rail Wagons Ltd.* [1965] 2 Q.B. 355.
(4) *The Berny* [1977] 2 Lloyd's Rep. 533.

APPEAL IN CHAMBERS.

K. Gopalan for the appellants/plaintiffs.
Goh Kok Leong for the respondents/defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: This appeal against the decision of the Registrar requires consideration of the circumstances under which the name of a defendant in an admiralty *in rem* action may be corrected under Order 20 rule 5(3) of The Rules of The Supreme Court 1970 ("hereinafter referred to as "the Rules") and of the circumstances under which an admiralty Writ *in rem* may be renewed under Order 6 rule 7(2) of the Rules. A brief chronology of a few important dates and of the events, including the steps taken in the proceedings, is necessary to an understanding of the issues.

The Appellants were the receivers and owners of 93 bales of cotton sheets shipped under two bills of lading from Karachi for Singapore in the Respondents' vessel known as "Brani Island", a Singapore ship. The governing law of the contract of carriage is Singapore law. Clause 17 of the bills of lading contains the usual provision that in any event the Respondents shall be discharged from all liability in respect of any loss or damage unless suit is brought within one year after the delivery of the goods.

On October 27, 1979 the Appellants took delivery of the goods and found that there was damage, giving rise to a claim of about $110,000. Their former solicitors, Messrs Wu & Raja, lodged a claim with the Respondents who caused a bank guarantee for $155,756.32 to be issued in favour of the Appellants, in consideration of which the Appellants agreed not to arrest any of the Respondents' vessels.

As negotiations for an amicable settlement, which the parties conducted up to October 1980, failed to conclude in any agreement, the Appellants on October 16, 1980 commenced an admiralty *in rem* action against "The Owners of the ship or vessel 'Brani Island' " claiming damages for breach of contract and/or negligence. The Writ was issued ten days before the expiry of the one year limitation period which fell on October 26, 1980.

On April 21, 1981, some six months after the date on which the *in rem* writ was issued, the Appellants amended the Writ by deleting the name of the Respondents and substituting therefore the words: "The Owners of the ships or vessels Brani Island, Senang Island, Kusu Island." The Appellants alleged that Senang Island and Kusu Island were sister ships of Brani Island. The amendments were made without leave of the Court under Order 20 rule 1(1) of the Rules.

It was clear that from April 21, 1981 the Appellants intended to serve the Writ on any one of the three vessels. However, as was subsequently discovered, Brani Island was broken up in the last quarter of 1980. It would appear that the Appellants' new solicitors learned of the break up of the vessel only in early 1982.

On April 8, 1981 the Appellants' new solicitors instructed Messrs Caleb Brett (S) Pte. Limited to keep a watch on all three vessels with a view that the Writ might be served on any of them. Caleb Brett failed in their tasks. Senang Island was in fact within jurisdiction for six days between April 18 & 24, 1981. Kusu Island was in Singapore on three occasions between June and September 1981. On the last occasion, Kusu Island was in Singapore for one month and 9 days between August 5 and September 6. Caleb Brett stated later that the visits of the two vessels in Singapore had "escaped their notice at the material times due to (the) great volume of work."

A day before the 12 month currency of the Writ was due to expire the Appellants by an *ex parte* application applied on October 14, 1981 to renew the writ for a period of another 12 months from October 16, 1981. The Assistant Registrar gave leave to renew the Writ. The Appellants' solicitors, who were themselves unaware of the earlier visits of both Senang Island and Kusu Island, were obviously in no position to apprise the learned Assistant Registrar of those previous visits of the vessels.

On October 23, 1981 Caleb Brett informed the Appellants' solicitors that Kusu Island was in port. On the following day, the Writ, after the usual deletions of the names of Brani Island and Senang Island, was served on Kusu Island. On November 2, 1981 the Respondents entered a conditional appearance.

By a summons-in-chambers filed on November 11, 1981 the Respondents sought the following orders:–

"(1) an order that the amendment on April 21, 1981 under Order 20 Rule 1 of the Rules of the Supreme Court 1970 by the Plaintiffs in the Admiralty Writ of Summons commencing this action be disallowed and struck out and that the service of the said Admiralty Writ of Summons on the ship or vessel "KUSU ISLAND" be set aside.

(2) Further or alternatively, an order that the Order of Court dated October 23, 1981, renewing the said Admiralty Writ of Summons for a period of 12 months from October 16, 1981, and the service thereof on the said ship or vessel "KUSU ISLAND" be set aside.

(3) the Plaintiffs do pay to the Defendants forthwith the Defendants' costs of this action and of and occasioned by this application to be taxed."

The application, it will be observed, was filed 18 days after service of the Writ was effected on the Kusu Island and 9 days after conditional appearance was entered. So far as prayer 1 is concerned, it was sought under Order 20 rule 4(1) of the Rules under which a party may apply to the Court to disallow an amendment made under Order 20 rule 1 (1) within 14 days after the service on the party of the Writ so amended. In considering the application, the Court is required by Order 20 rule 4(2) to see what it would do if an application for leave to make the amendment in question had been made under Order 20 rule 5 at the date when the amendment was made under Order 20 rule 1(1). If the Court in considering the amendment under rule 5 would have refused it, it shall order the amendment to be struck out.

In deciding on prayer 1, it is therefore necessary to consider Order 20 rule 5 of the Rules. The relevant provision of rule 5 for present purposes is paragraph (3). However, it is necessary to set out all the paragraphs of Order 20 rule 5 to appreciate the context in which paragraph (3) appears.

Order 20 rule 5 provides:–

"(1) Subject to the following provisions of this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) and (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

So far as prayer 2 is concerned, the application was made under Order 32 rule 6 which provides that the Court may set aside an order made *ex parte*.

At the conclusion of the hearing of the application, the Registrar granted the Respondents' application. Against that decision this appeal was brought before me.

Before me, counsel for the Appellants canvassed a procedural point. As the Respondents had filed their application four days out of time and contrary to Order 20 rule 4 of the Rules, counsel submitted that the application should be dismissed. I am unable to accept the submission. The non-compliance was a mere irregularity which should not nullify the application.

The first substantive issue for my decision is whether I would have allowed the amendments, by which the names of Senang Island and Kusu Island were added, if an application was made to me on April 21, 1981 under Order 20 rule 5 paragraph (3). Before I refer to the arguments of both parties, I would like to say a few words about the principles governing a court's power to grant an amendment and about Order 20 rule 5. Generally, all amendments ought to be allowed "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings": per Jenkins, L.J. in *G.L. Baker Ltd* v. *Medway Building & Supplies, Ltd*[1].

In addition to the foregoing general remarks, it is particularly germane for present purposes to state that if an applicant has from the beginning formulated his Writ which, though defective in some respect, falls within any of the circumstances set out in paragraphs (3), (4) and (5), no question of depriving any defence of time bar arises. The defects, if permitted by a Court to be cured, will be treated as having been cured from the beginning.

An analysis of the scope of paragraphs (3), (4) and (5) will make this even clearer. Paragraph (3) deals with a mistake over the description of the identity of a party to the proceeding. Two conditions have to be satisfied to trigger its operation. First, the mistake must be a genuine mistake. That should be an easy question to decide. Secondly, the mistake is not misleading or such as to cause any reasonable doubt as to the identity of the person as a plaintiff or a defendant. The underlying thrust of the paragraph is that in truth and in substance the litigant is known, although there is a nominal defect in form. If an amendment is allowed, even if allowed after any relevant period of limitation current at the date of the issue of the Writ has expired, what has been done is in effect a mere correction of the nomenclature with which the party is labelled. The other party at all material times knew in fact and in substance who the opposing litigant is.

Similarly, with regard to paragraph (4), it allows an alteration of the capacity in which a party sues if the capacity in which, if the amendment is made, the party will sue is one in which he might have sued at the date at which the claim was asserted. Again, the amendment is nominal.

Paragraph (5) is even more poignant in underscoring the trend towards giving effect to substance rather than to form. It recognises the existence of a set of facts for which relief is claimed to admit the addition or even substitution of a so-called "new" cause of action after the expiry of the limitation period.

What is common in all three paragraphs is this. For an application to come within any of the paragraphs, there must already be asserted in the Writ or the pleading a set of allegations which, in spite of the expiry of the limitation period, reasonably identify the party suing or sued, which is capable of conveying the capacity of the party to sue or which permits the addition or substitution of another cause of action. In other words, the matters of identity, capacity or cause of action are already asserted or implied, from the inception of the Writ or the filing of the pleading and it is merely a matter of correction to make explicit what is implicit.

The position is clearly and ably set out by the editors of *The Supreme Court Practice* 1982 Volume 1 at 20/5-8/7 in the following terms:—

"The principle underlying the new powers of the Court under Rule 5 is that if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified in paras. (3), (4) and (5), the defence of the Statute of Limitations would not have been available to the defendant; and accordingly, if in its discretion, the Court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paras., so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend in the cases specified in these paras., that the de-

fendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under 0.20, r.8, and 0.15 rr. 6, 7 and 8 (see Holroyd Pearce, L.J., in *Pontin* v. *Wood,* [1962] 1 Q.B. at p.609.)

I turn now to the arguments of the Respondents, put before the Registrar in support of prayer 1. They put forward three reasons. In the first place, they argued that the Court should not allow new defendants to be added to an action. They relied heavily on *The Preveze* [(2)]and in particular a passage of Mr. Justice Mocatta (as he then was) at p.205. I shall come back to this decision later. Secondly, the Respondents said that matters of substantive law are not alterable by rules of practice and procedure and insofar as the latter purport to do so they are *ultra vires.* Thirdly, the Respondents also contended that the date when an amendment takes effect would be the date on which the amendment was made and the original amendments would not relate back to the date of the original document which it amended. This was all the more so in the case where a new party was added. It will be seen that all three arguments are premised on the assumption that a new defendant was added by the amendment and that the new defendant would lose the defence of time bar if the amendment were allowed.

As against these arguments of the Respondents, the Appellants submitted that a consideration of prayer 1 of the Respondents' application raises the question: In an action *in rem*, who is the defendant – the *res* itself or the owner of the *res*? It is clear, as the Appellants submit, that the Respondents' case proceeded on the basis that the *res* itself was the defendant and that the addition of Senang Island and Kusu Island after October 16, 1980 was effectively adding two new defendants who, at the time they were added to the Writ, could rely on the defence of a time bar as a complete defence to the claims of the Appellants.

I am of the view that the amendment, which added the names of both Senang Island and Kusu Island, was merely a variation or amplification of the name of the Respondents which owned all three ships at all material times. The Respondents were the only defendant intended to be sued from beginning to end. It is fallacious to assume that a new defendant was introduced or added by the amendment. An action *in rem* is not an action against the *res* itself but is merely a procedural device to obtaining jurisdiction over the owner of the *res*. In a Writ *in rem*, the defendant is not described simply as "the ship X" but as "The Owners of the ship X."

The decision of Mocatta J. in *The Preveze (supra)* is distinguishable. Counsel for the plaintiff in that case accepted that the question whether the amendment of the Writ by the addition of 9 sister ships was valid depended on whether, at the time the amendment was made, the Court would have exercised its discretion under the proviso to section 8 of the Maritime Convention Act 1911 and extended the two year period limited by the commencement of proceedings. No such consideration arises here.

The consideration before me is whether the Appellants have brought themselves within paragraph (3) of Order 20 rule 5. In my view, the Appellants have brought themselves within the provisions of that paragraph. The mistake in not including the names of two other vessels was a genuine mistake. What is most significant is the fact that the Respondents were the only party impleaded at all material times. And they knew it beyond any peradventure.

I now consider the conduct of both parties to these proceedings. Shortly after taking delivery of the cargoes, the Appellants lodged their claims with the Respondents. The Respondents provided a bank guarantee to avert any arrest of their vessels. The correspondence showed that the parties were talking of a settlement right up to October 1980. Whilst negotiations were taking place, it is reasonable to infer that the Respondents were at the same time taking steps to scrap Brani Island. It appears that the vessel was broken up in the last quarter of 1980 and shortly before the expiry of the one year limitation period. The Respondents withheld this fact from the Appellants. The Appellants learned of the break up of the vessel only in early 1982.

In these circumstances, the Registrar ought not have made an order in terms of prayer 1 of the Respondents' application.

I now turn to the question whether the order of the Assistant Registrar made on October 23, 1981 should be set aside as ordered by the Registrar.

The principle in this regard is firmly settled by the decision in *Heaven* v. *Road & Rail Wagons Limited.*[(3)] It is this. Where an application to renew a writ is made after the expiry of the re-

levant period of limitation, the Court should not exercise its discretion in favour of renewing the writ, the effect of which would be to deprive the defendants of an otherwise good defence to the claim, unless there were exceptional circumstances which amount to a good and sufficient cause for renewing the writ. The circumstances which would justify a renewal of the Writ were ably set out by Brandon J. (as he then was) in *The Berny* [4]. These circumstances are so well known that I need not repeat them. *The Kusu Island*, as it will be recalled, was in fact in Singapore on three occasions during the initial currency of the Writ. Although Caleb Brett had let down the Appellants, their lapses do not excuse the Appellants who unfortunately must accept the consequences. The Appellants had not exercised due diligence. *The Senang Island* and *the Kusu Island* were present within jurisdiction on so many occasions and there were ample opportunities for the Appellants, if they had been more vigilant, to have effected service of the Writ on either of them. Accordingly, I am of the view that the Registrar, who unlike the Assistant Registrar, was apprised of the visits of both the vessels, had properly exercised his discretion in setting aside the order renewing the Writ.

In the circumstances, the appeal is dismissed with costs as to prayer 2 of the Respondents' application. The appeal as to prayer 1 of the application is allowed with costs.

Order accordingly.

Solicitors: *Ong & Tan; Godwin & Co.*

MALAYSIAN REPORTS

C.C. NG & BROTHERS SDN. BHD. v. GOVERNMENT OF STATE OF PAHANG

[F.C. (Lee Hun Hoe C.J., (Borneo), Seah & Syed Agil Barakbah F.JJ.) November 11 & 13, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No 196 of 1984]

Practice and Procedure – Application to strike out writ of summons and statement of claim on ground that it was abuse of process of court – Jurisdiction to be sparingly exercised.

Companies – Transfer of shares – Validity of – Companies Act, s. 162.

In this case the appellants had brought an action against a number of defendants, including the respondent. The 1st defendant was a company formerly owned by the Ng family. The 2nd defendant, Amanah Saham Pahang Bhd. had entered into a joint venture agreement to assign their timber concession to the 1st defendant, in consideration of the undertaking to transfer 51% of the shareholding of the 1st defendant to the 2nd defendant. The respondent (6th defendant) agreed to grant to the 2nd defendant a timber concession in Pahang. After the timber concession had been granted, the 2nd defendant assigned to the 1st defendant all the rights, title and interest of the 2nd defendant in the concession. The respondent (6th defendant) consented to the said assignment. In turn the Ng family transferred 51% of their shares in the 1st defendant company to the 2nd defendant. Subsequently the Ng family transferred their remaining 49% in the 1st defendant company to the appellants. Differences arose between the 2nd defendant and members of the Ng family and the appellants thereupon brought an action against the defendants in effect for an order that the agreement had not been validly terminated. As against the 6th defendant (respondent) the appellants claimed a declaration that it was bound to do all such acts and things as are necessary to make effective the concession agreement and assignment to enable the 1st defendant company to continue its operation. Conditional appearance was entered by the 6th defendant (respondent) and a summons-in-chambers was taken out (a) to set aside or strike out the writ of summons and statement of claim or (b) alternatively to strike out the name of the 6th defendant from the said writ and the statement of claim. The learned trial judge ruled that the "plaintiff's membership of the first defendant was *ultra vires* the articles and he could not bring himself with it to sue". The learned Judge made an order in terms of the summons. The appellants appealed.

Held: (1) in this case the inherent jurisdiction of the court was invoked to strike out the writ and statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and should be exercised with great caution;

(2) in this case no application had been made to challenge the validity of the transfers of the shares under